IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6193

JOHN EVERETT BROWN and
THOMAS DEAN SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. pp. 243-246), reported at 452 F.2d 868 (1971).

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1971. A petition for rehearing was not filed.

The petition for a writ of certiorari was filed on February 17, 1972; it was granted on June 26, 1972 (App. 249). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Wherein a conspiracy trial, upon joint motion to quash a search warrant and to suppress the evidence obtained thereby, the search warrant is quashed because it and the supporting affidavit were signed in blank by the affiant and the issuing judge, was it error for the Court to hold that two co-conspirators had no standing to suppress the evidence seized under the search warrant because they did not have any possessory interest in either the premises that were searched or the property that was allegedly procured by reason of the search?

2. In a conspiracy trial where neither of two defendants testified, did the Court commit reversible error by admitting the confessions of each defendant, each of which incriminated his codefendant, when the confessions were made to police officers after the arrest of both defendants and the confessions were not made by the defendants in one another's presence, and after the conspiracy had terminated?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted upon an indictment charging them with having conspired together and with a co-defendant, Clinton Knuckles, to steal merchandise in Cincinnati, Ohio and transport same to Manchester, Kentucky, in violation of 18 U.S.C. 371; and of the substantive offense of transporting stolen merchandise from Cincinnati, Ohio to Manchester, Kentucky, in violation of 18 U.S.C. 2314.

On February 1, 1971, the petitioners were sentenced to five years imprisonment on each Count with the sentences to run concurrently (App. 238). The Court of Appeals affirmed (App. 243-246).

1. Prior to trial the defendants filed motions to suppress all evidence obtained as a result of the search warrant issued by the police court of the City of Manchester, Kentucky. At the hearings upon motion to suppress it developed that on August 29, 1970 J.M. Shelton, City Police Judge (App. 13) signed a search warrant in blank and it was filled in later by the County Attorney. The affidavit in support of the search warrant

which was at sometime signed by one William West, was not signed nor sworn to before the Police Court Judge (App. 15-16).

The County Attorney, Charles Smith, testified that when Judge Shelton signed the affidavit and search warrant neither had been completed or filled out (App. 19).

The assistant United States Attorney conceded to the Court that the affidavit and search warrant were "not worth the paper they were written upon", and that it would be futile, useless and very aggravating for him to argue otherwise. The court agreed that they were not worth the paper they were written upon (App. 29). The court sustained the motion to suppress, "to the extent that it seeks to quash the affidavit and search warrant and any seach required to be and made thereunder" (App. 30).

Federal, State and local officers armed with the "worthless" search warrant proceeded on the Saturday afternoon in question to the Knuckles Dollar Store. The search warrant was read to the defendant, Clinton Knuckles (App. 56) while the store was open and customers were in it (App. 57). Fifteen or twenty minutes thereafter the customers were gotten out and the store was closed (App. 78). The search continued until at least 11:00 or 12:00 o'clock that night in both the public and private portions of the store (App. 64). Local officers were posted to guard the store during the night and they returned and continued to search, seize, take, and inventory merchandise the next day, Sunday, August 30, 1970 (App. 67) until 9:30 or 10:00 o'clock at night (App. 69). During the course of the search and seizure, almost two moving vans full of merchandise was taken from the premises (App. 68).

With regard to the petitioners, Brown and Smith, who were arrested in Cincinnati, Ohio and were in custody during the time while the search and seizure was being carried on at the Knuckles Dollar Store in Manchester, Kentucky (App. 122), the trial court was of the opinion, and so ruled, that neither had standing to have suppressed the evidence seized at Knuckles Dollar Store; that they did not have any possessory interest in either the property that was searched or the property that was seized by reason of the search (App 109).

2. The government's evidence upon the trial relating to the confessions obtained from the petitioners shows that almost immediately upon the subject of confessions being mentioned, counsel for petitioners objected to the introduction of any statement of one petitioner made out of the presence of the other (App. 124), and the defense attorneys made specific reference to *Bruton v. United States*, 391 U.S. 123.

The Court reasoned in overruling the objection that *Campbell v. United States*, 6th Cir., 415 F.2d 356 decided since *Bruton*, laid down the rule that *Bruton* does not apply in cases of conspiracy (App. 124). Whereupon, counsel inquired of the Court as to how the conspiracy count of the indictment could be separated from the substantive charges (App. 124). The Court then stated that the only way he could take care of that problem would be by either an admonition to the jury or in his instructions to the jury, or perhaps both. The Court further stated, "of course, obviously any statement made by a co-defendant out of the presence of the [other] defendant would not be admissible as to Count Two [which is the substantive count charging interstate shipment of stolen merchandise] . . . . " (App. 124).

Petitioners' counsel then asked the Court to grant a severance as to Counts One and Two of the indictment (App. 125), which was overruled upon the grounds that the motion was not timely (App. 127).

Detective, Raymond Hulgin, of Hamilton County, Cincinnati, Ohio, (App. 118), in relating to the jury the confession which he elicited from the petitioner, Thomas Dean Smith, stated that on previous occasions when he, Smith, had taken merchandise from his employer's warehouse to Knuckles Dollar Store in Manchester, Kentucky, that he had been accompanied by his co-defendant and co-conspirator, the petitioner, Joseph Everett Brown (App. 128-129). Objection was immediately made on behalf of the petitioner, Brown, and a motion was made to strike the testimony referring to Brown (App. 129).

The Court then ruled that the motion was sustained as to Count Two of the indictment, because the statement would be hearsay as to the co-defendant, Brown; but the law was otherwise as to Count One of the indictment [the conspiracy count], and he indicated that he would take care of that in the instructions at the time he instructed the jury; because that evidence was not to be considered against the petitioner, Brown, as to Count Two of the indictment [the substantive count or interstate theft] (App. 130).

At various times during the giving of this testimony, upon objection by the petitioner, Brown, the Court admonished the jury to not consider references made to him as they related to Count Two of the indictment only (App. 134, 135, 137, 138, 139, 140, 141, 142).

Detective Hulgin also interviewed the petitioner, Joseph Everett Brown, out of the presence of the other

petitioner, Thomas Dean Smith, (App. 144). In relating the confession obtained from Brown to the jury, Detective Hulgin testified that Brown said that he had previously taken merchandise from his employer's warehouse to Knuckles Dollar Store in Manchester, Kentucky and that on these trips he had been accompanied by the petitioner, Smith (App. 146).

The same objection was made to this testimony by the petitioner, Smith, and the Court gave the same admonition to the jury (App. 147).

Neither of the petitioners testified.

3. The Sixth Circuit determined that no error had been committed in the admission against the petitioners of the merchandise illegally seized in Knuckles Store because the petitioners claimed no possessory nor proprietary right in the goods or in Knuckles Store, placing its reliance upon *Alderman v. U.S.*, 394 U.S. 165 (1969); and *U.S. v. Wells*, 437 F.2d 1144 (6th Cir. 1971).

With regard to permitting the confession of each petitioner to be introduced implicating or incriminating the other petitioner, the Sixth Circuit found that the district court violated the teaching of *Bruton v. United States*, 391 U.S. 123 (1968), in admitting the confessions, but upon the authority of *Chapman v. California*, 386 U.S. 18 (1967); and *Harrington v. California*, 395 U.S. 250 (1968), affirmed the judgment "... because the error was harmless beyond a reasonable doubt." (App. 243-244).

4. The District Court, without objection, (App. 237) gave the following relevant instructions to the jury:

[fol. 472] "As to the offense charged in Count 1 of the indictment it is charged in the indictment that beginning on or about June 12, 1970, and continuing until on or about August 28, 1970, in the

Eastern District of Kentucky, the defendants, Joseph Everett Brown and Thomas Dean Smith, agreed, combined, confederated and conspired together to commit offenses against the United States . . . . " (App. 225-226).

* * * * * *

"A conspiracy is a combination of two or more persons by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of "partnership in criminal purposes," in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey, or to disregard the law." (App. 226).

* * * * * *

"In determining whether or not a defendant or defendants, or any other person, was a member of a conspiracy, [fol. 476] the jury are not to consider what others may have said or done, that is to say, the membership of a defendant, or any other person, in a conspiracy, must be established by the evidence in the case as his own conduct, what he himself willfully said or did.

"Whenever it appears beyond a reasonable doubt from the evidence is the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance

of such conspiracy, and in furtherance of some object of purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and heard the statement made, or saw the act done." (App. 228).

ARGUMENT

I

With regard to the question of standing by the petitioners to object to the unlawful search and seizure of property from Knuckles Dollar Store, it should be borne in mind that substantially all evidence allegedly in Knuckles possession was introduced to convict the petitioners of conspiracy to transport stolen goods in interstate commerce.

In connection with the conspiracy count, the Court instructed the jury that a conspiracy is a "partnership in criminal purposes" in which *each member becomes the agent of every other member* (App. 226); and that whenever it appears beyond a reasonable doubt that a conspiracy existed and that the defendant was one of the members, "... the *acts* thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and *acts* have occurred in the absence and without the knowledge of the defendant..." (App. 228).

In *Territory v. Goto*, 27 Hawaii 65, it was stated that in the eyes of the law conspirators are one man, they breathe one breath, they speak one voice, they wield one arm, and the law says that the acts, words and declarations of each, while in the pursuit of the common design, are the words and declarations of all.

That a conspiracy is a partnership in crime is well recognized. *Fishwick v. United States*, 329 U.S. 211, 216; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253; *Pinkerton v. United States*, 328 U.S. 639, 644. The act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking. *Fishwick v. United States*, 329 U.S. 211, 217; *Logan v. United States*, 144 U.S. 263, 309; *Brown v. United States*,, 150 U.S. 93. So long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act' " *Pinkerton v. United States*, 328 U.S. 639, 646; *United States v. Kissel*, 218 U.S. 601, 608. The motive or intent may be proved by the *acts* or *declarations* of some of the conspirators in furtherance of the common objective. All members are responsible, although only one did the act; or, stated differently, in the law of conspiracy the overt act of one partner in crime is attributable to all. *Wiborg v. United States*, 163 U.S. 632, 657; *Pinkerton v. United States*, 328 U.S. 639, 647.

Thus in conspiracy matters we have incorporated into it the law of agency and vicarious responsibility. It must be conceded that the defendant and co-conspirator, Clinton Knuckles, in Manchester, Kentucky, was the agent, servant, and employee of the petitioners, Smith and Brown; and that as such he was acting within the scope of his partnership or agency. It is a fair statement of law that the general rules of law applicable to agents likewise apply to partners. *Irwin v. Williar*, 110 U.S. 499.

The Uniform Partnership Act, sec. 9(1), provides in part that every partner is an agent of the partnership for the purposes of its business, and the act of every partner

binds the partnership. Section 6(1) of that act provides that a partnership is an association of two or more persons to carry on as *co-owners* a business for profit. And Section 8(1) provides that all property originally brought into the partnership *stock* or *subsequently* acquired by purchase or otherwise, [stealing or theft], on account of the partnership, is partnership property.

Therefore, if we apply the legal principal that conspiracy is a partnership crime, we must look to the law pertaining to partnership property. By definition the petitioners, Smith and Brown, held title or an interest in and to the partnership property which was unlawfully found and seized in Knuckles Store in Manchester, Kentucky. While Smith and Brown did not have actual possession of the seized property, their possession, as partners with Knuckles, was, to say the least, constructive. If to possess the goods found in Knuckles Dollar Store is an "act" within the meaning of that term as used in the law and the District Court's instructions to the jury, and that possession is an overt act and attributable to Knuckles, then his possession thereof must also be attributable to Smith and Brown.

If the foregoing has any validity in law or reason, then the petitioners, Smith And Brown, have standing as persons aggrieved by an unlawful search and seizure to have the evidence seized from Knuckles Store suppressed.

The legal fictions which have been developed and enunciated for conspiracies fulfill the "tendency of a principle to expand itself to the limit of its logic." *Krulewitch v. United States*, 336 U.S. 440, concurring opinion of Jackson, Jr., ["the phrase is Judge Cardozo's—Nature of Judicial process, P. 51"] And presumptions and legal fictions should cut both ways for the prosecution as well as the defendant.

In *Jones v. United States*, 362 U.S. 257, 258, possession was the basis of the government's case against petitioner for violating the laws against narcotics. The Government challenged petitioner's standing to have suppressed the narcotics found in a friends apartment where petitioner was staying at the time because he alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an "invitee or guest". The district judge denied his motion to suppress because he had no standing.

This Court's reasoning there is equally persuasive and apposite to this case when it stated that:

> "... to hold the petitioner's failure to acknowledge interest in the narcotics on the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjects the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e)."

Here the Government would shackle the petitoners, Brown and Smith, with the possession of a store full of

merchandise wrongfully seized from Knuckles to convict them, but deny them the same possessory interest required under Rule 41 (e), to have the same evidence suppressed.

II

Although the Sixth Circuit acknowledged the error of the District Court in allowing into evidence the confession of one defendnat, it found the error to be harmless, relying on *Burton v. United States*, 391 U.S. 123. The confessions were, of course, made after the alleged conspiracy had been frustrated.

In *Fishwich v. United States*, 329 U.S. 215, 217, this Court ruled that a confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it.

In *Harrington v. California*, 395 U.S. 250, the rule was stated to be that although the use of confessions by co-defendants who did not testify amounted to a denial of the petitioner's constitutional right of confrontation, the evidence supplied through such confessions was merely cumulative, and the other evidence against the petitioners was so overwhelming the court could conclude beyond a reasonable doubt that the denial of the petitioner's constitutional rights constituted harmless error.

A similar rule was enunciated in *Chapman v. California*, 386 U.S. 987.

If these rules have been properly applied to the instant case, then in the future where two co-conspiring defendants are caught in a truck loaded with allegedly stolen merchandise, it will be harmless error to admit into

evidence their confession incriminating one anoth
although it is a plain violation of their right of confron
tion as announced in *Bruton*.

CONCLUSION

For the reasons stated, the judgment of the Court o
Appeals should be reversed and the case remanded wi
directions to send it back to the district court for
hearing on the question of petitioner's standing t
suppress the evidence seized in Knuckles Store, and for
new trial free of the errors committed.

Respectfully submitted,

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